

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

210
77-1438

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

RUSSELL BUFALINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT BUFALINO'S REPLY BRIEF

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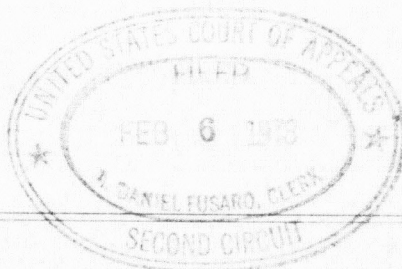


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Point I:

Point I of the Government's brief deals with the Defendant's argument that a new trial should be granted because of third party contact with the jurors during the course of the trial. The Government argues that the defendant cannot now attack the procedure used by the Trial Court in examining the jurors in camera and outside the presence of the parties because at trial the Defendant agreed to this procedure. (Government's Brief p. 20) This alleged agreement is not supported by the record.

The United States Supreme Court has said that a waiver is "an intentional relinquishment or abandonment of a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 56 S. Ct. 1014 (1938).

U.S. v. Crutcher, 405 F. 2d 239 (2nd Cir. 1968) involved the right of a defendant to be present when the jury was

impaneled. Since the Court could not find in the record that defendant was advised of his rights under Rule 43 or that he knowingly and voluntarily waived those rights, it remanded to determine the issue of an understanding waiver. The Court stated at page 244 that:

“Although similar situations probably will arise infrequently, we suggest that the preferred practice would be for the Court to advise the Defendant of his rights under Rule 43 and, if the defendant so desires, obtain an intelligent and knowing waiver.”

Nothing in the record reveals that the Defendant Bufalino was advised of his rights under Rule 43, or that either he or his counsel intelligently and knowingly waived those rights.

The record reveals that the procedure used in examining the jurors was not one agreed upon by counsel, but rather was one established unilaterally by the Court when the Court stated:

“I think it is better for me to question them on my own and on the record.”

(Appendix 88)

In the case of *U.S. v. Taylor*, 562 F. 2d 1345 (2nd Cir. 1977), relied upon by the Government in their brief, this Court stated:

“The question could also be waived as by the court’s procuring advance consent of counsel on both sides *and of the defendant’s themselves.*”

(Emphasis Added)

Despite the statements of the Government to the contrary, the record does not show that the Trial Court obtained the advanced consent of the Defendant and his counsel relative to the *in camera* voir dire of the jury.

The Government then argues that any violation of Rule 43 in this case is harmless error. (Government's Brief p. 20) The United States Supreme Court has stated that such an error is harmless only when the record shows that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967). It is admitted that generally a violation of Rule 43 is subject to the harmless error rule. However, this Court has held that a violation of the Defendant's right to be present while a jury is being selected cannot be treated as harmless error. *U.S. v. Crutcher*, supra. Although in this case the voir dire in question was not for the purpose of impaneling a fair and impartial jury, but rather for the purpose of preserving a fair and impartial jury, it is submitted that the two situations are analogous and of equal importance and therefore it is submitted that a violation of Rule 43 in this case cannot be considered harmless.

The Government argues that a new trial should not be granted since the third party contact with the jury in this case was not concerning a matter pending before the jury. The cases cited by the Government in support of this argument are not at all similar to the facts in this case. In *U.S. v. Brasco*, 516 F. 2d 816, 819 (2nd Cir.), the jurors violated the court's sequestration order by going home, to the barber shop, the beauty parlor, etc.

U.S. v. Berger, 433 F. 2d 680, 686 (2nd Cir.), involved a similar violation of the Court's sequestration order when a female juror spent the night at home with her husband. In *U.S. v. Lubrano*, 529 F. 2d 633, 638 a U.S. Marshal brought two coffees to the jury without any discussion. Contrary to the cases cited by the Government, the record in this case reveals repeated activity on the part of spectators consisting of shadowing, glaring at and talking with jurors and for the Government to argue that this activity did not pertain to the matter pending before the jury is ludicrous.

The Government under Point I of its brief makes a number of erroneous statements of fact. The allegation that no defense counsel raised the jury issue from August 3rd until six days later after the Court charged the jury is untrue. (Government's Brief p. 16) Upon completion of the Government's case, all defense counsel again moved for a mistrial on the basis of the third party contact with the jury. (A.115, 119)

The Government argues that at no point did the Defendant's request a hearing on the issue of jury prejudice. (Government's Brief p. 19) The record clearly shows that the Defendant specifically requested a hearing immediately prior to the in camera voir dire by the Court. (A. 87)

The Government at page 15 of its brief states that four jurors (Scheps, Ortiz, Coleman and Henry) said that the conduct of the spectators had no effect on them or their judgment. This is clearly erroneous with respect to both Ms. Henry (A. 89) and Ortiz (A. 97).

Although there are a number of other errors contained in the Government's brief, these insofar as they are relevant to this case will be handled at oral argument.

Respectfully submitted,

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Due and timely service of Two copies
of the within *BMK* is hereby
admitted this *67th* day of *FEBRUARY* 1978
Allen Levine, AUSA
.....
Attorney for *APKUSA*

